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Office - Supreme Court, U.S.
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IN THE
SUPREME COURT
OF THE
UNITED STATES OF AMERICA

JANUARY 1984 TERM

DANNY CLARK CROSS,

PETITIONER,

VS.

GENERAL MOTORS CORPORATION,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DANNY CLARK CROSS
#7 Beverly Place
St. Louis, Mo. 63112
(314) 367 3743
(312) 580 5646

QUESTIONS PRESENTED FOR REVIEW

1. Is dismissal without prejudice, pursuant to Federal Rule Of Civil Procedure 37(b) an abuse of discretion where no order mandating discovery is directed to a party dismissed under the rule?

2. Should a conspiracy count under 42 U.S.C. 1985(3) in a complaint alleging race discrimination be dismissed solely on grounds that a corporation cannot conspire with its agents?

3. Can a federal district court withdraw the status of in forma pauperis without articulating specific reasons or give a factual basis therefor?

4. Is there an abuse of discretion where a party is assessed costs upon dismissal but which party did not cause dismissal?

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Danny Clark Cross v. General Motors Corp.
721 F. 2d 1152 (8th. Cir. 1983)

Danny Clark Cross v. General Motors Corp.
563 F. Supp. 386 (E. Dist. Mo. 1982)

JURISDICTIONAL STATEMENT

This petition for writ of certiorari comes to seek review of judgement entered by the Eighth Circuit Court Of Appeals, which judgement affirmed in every respect the decisions and orders of the district court for the eastern district of Missouri, eastern division.

The date of judgement of the Eighth Circuit Court Of Appeals (and time of its entry) is November 18th, 1983.

A petition for rehearing was served and filed on December 2nd, 1983. However, the appeals court dismissed said petition on grounds that the petition was untimely. The dismissal of the petition for rehearing was dismissed by order of court dated December 29th, 1983.

The statutory provisions believed by

your petitioner to confer jurisdiction upon this Court are 28 U.S.C. §§ 1254(1) and 2101(c).

APPLICABLE STATUTES WHICH CASE INVOLVES

42 U.S.C. § 1981

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kinds, and to no other."

42 U.S.C. § 1985(3)

"If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the

laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injuried in his person or property, or

deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators."

STATEMENT OF THE CASE

Factual Background

On April 4th, 1980, your petitioner, Danny Clark Cross, filed a civil rights action against his former employer, General Motors Corporation (GMC), asserting claims of employment discrimination inviolation of Title 42 U.S.C. §§ 1981 and 1985(3). Cross alleged that GMC intentionally racially discriminated against him. He alleged that GMC and its agents, both in the capacity as agents and in their capacity as individuals — between and amoung themselves — conspired to and did deprive him of employment rights, harassed him for racially motivated reasons, and disparately treated him within the work environment. The civil rights violations

premised on disparate treatment involved, inter alia, the unequal enforcement of work rules and regulations, inappropriate job assignments, false charges of shop violations, creation of a false reputation, alteration of medical records, denial of pay for work performed, and intentional acts of battery and threats to the personal health, life and person of Cross, your petitioner.

As to the proceedings below, the case came to trial on January 5th, 1982. On this day a jury was selected and duly impaneled, both parties below made opening statements to the jury. On this same day a discussion transpired between the court and respective party litigants concerning additional discovery belately requested by GMC. While it was the result of this discussion that GMC would be provided additional discovery, there was no

specific time schedule wherein which Cross was obligated to perform or respond, rather however, a response reasonable under the circumstances appears appropriate from the discussion.

On January 6th, 1982, Cross, your petitioner, provided additional discovery pursuant to the discussion, however, on this same day the trial court advised Cross that his response was inadequate, that more discovery should be provided. Hence, this same day the trial court directed Cross to make additional discovery and to do so this same day, indeed, to do so by a specific time. Such additional discovery was provided by Cross well in advance of the time deadline imposed by the trial court. When court reconvened on January 7th, 1982, the district court concluded that Cross had displayed callous disregard for his

responsibilities as an attorney, and that his actions showed sufficient indicia of badfaith to warrant imposition of serious sanctions. Therefore, the court dismissed Cross's cause of action without prejudice and retained jurisdiction to determine appropriate allocation of costs, and to consider whether Cross's in forma pauperis status should be revoked. On April 26th, 1983, the district court entered its final order wherein, inter alia, it revoked the pauperis status of Cross.

The jurisdiction of the federal district court under the statute providing the cause of action is grounded in Title 28 of the United States Code of 1948 as subsequently amended Sections 1331 and 1343.

ARGUMENT

Dissmissal Under F.R.C.P 37(b)

Your petitioner believes that special and important reasons exits that indicate the appropriateness of the issuance of the Writ in this case. First, the judgement of the court of appeals affirms the order of the district court with respect to dismissal without prejudice pursuant to Federal Rule Of Civil Procedure 37(b) (hereinafter referred to as FRCP 37 (b)) and does so without any reference to any specific order that had not been obeyed. Hence, the affirmation by the court of appeals comes — as does the district court's order — without any adherence to the mandate of the rule itself, namely, that the "party fails to obey an order to provide or permit discovery." In affirmation of the district court, the

judgement of the court of appeals sanctions a departure from the accepted and usual course of judicial proceedings under that rule as to call for an exercise of this Court's power of supervision. Moreover, FRCP 37(b) has a governing principle written directly into it as regard the invocation of its sanction dimension, namely, that the court only invoke "such orders in regard to the failure as are just," and not orders that are unjust.[1]

The rule addresses the situation in which the order of the court is not complied with and the sanction selected, in keeping with the rule, must be tailored to be just, i.e., the sanction must balance

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1. The record will reflect several reasons that indicate the dismissal is unjust. The record will reflect that of the ten times trial was postpone no postponement was cause at the instance of Cross. Only GMC requested continuances and only GMC received leaves accumulating to ninety days, with some of the requested leaves granted ex parte. Moreover, counsel for GMC failed to appear at a scheduled court conference and was not sanctioned.

in relation to the order that has been disobeyed. In short, FRCP 37(b) requires that an order issue before its sanctions can properly be invoked. See, e.g., 8 Wright & Miller, Federal Practice Procedure § 2289, at 790 (1970); 4A Moore's Federal Practice, para. 37.03 [2] [2.1-1] (2nd Ed. Rev. 1976). In the instant case no order issued to Cross in response to which he failed to comply and all matters respecting discovery were followed.[2]

Moreover, Cross had witnesses present to testify,[3] Cross had not contributed to pre-trial delays, the jury had been voir dired and opening statements had been made, in light of same, it can-

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2. In the opinion of the Circuit Court of Appeals, at page A1-7 of the appendix herein, it is indicated that Cross "substantially complied with the discovery request." However, the record will reflect that Cross complied completely with the directions of the district Court.

3. Many of Cross's witnesses had to travel over 60 miles to reach court (some over 300 miles).

not be maintained that the dismissal, with or without prejudice, is either balanced or just under the circumstances.

Lastly, the district court has provided what appears to be separate and distinct reasons for the time and premise of the dismissal. The district court filed an order[4] indicating the dismissal is premised upon FRCP 37(b), and subsequently, the court files an order[5] suggesting the dismissal is premised upon 28 U.S.C. § 1915. The affirmation by the court of appeals does not address this apparent duplicity. In addition, the reasons advanced by the appeals court concluding that no abuse of discretion had occurred respecting the dismissal below[6] do not deal substantively

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4. See appendix pp. A2 thru A2-6

5. See appendix pp. A3 thru A3-4

6. See appendix p. A1-7

with the imposition of the dismissal sanction and the extent, or lack thereof, to which the sanction adheres to the rules requirements.

In concert with the above stated reasons that this Court should issue the writ in the present case, this Court might relate that the need for the supervisory arm of this Court is here indicated to insure that the rules of procedure governing the federal district courts are being applied so as to obtain "the just, speedy and inexpensive determination of every action."[7]

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7. Federal Rule Of Civil Procedure 1. Also, within the opinion of the Eighth Circuit affirming the district court (see appendix p. A1-7) the court notes that it is questionable whether the goal of judicial economy was served by dismissing the action without prejudice on the third day of trial. Under these facts it cannot be concluded that the dismissal without prejudice, where the case consumed time in pre-trial - where the plaintiff proceeded in forma pauperis - and where a jury had been selected

Dismissal Of 42 U.S.C. § 1985(3)

On December 18th, 1980, the district court dismissed count I of Cross's compliant asserted under 42 U.S.C. § 1985(3) alleging a conspiracy by GMC and its agents, both as agents and as individuals, between and amoung themselves. The dismissal was predicated on case law holding that a corporation cannot conspire with its agents and that the effect of charging a conspiracy between a corporation and its agents is to charge a conspiracy by a single party. The judgement of the appeals court affirms the dismissal by making reference to facts that are not a concern of the status in question. Moreover, many of the facts alluded to by the appeals court do not accurately reflect the case at the trial level. First, the appeals court indicates that only GMC was named as a defendant; this of course is not accurate,

agents of the corporation were themselves named as individuals in the caption of the complaint as amended. Lastly, the appeals court indicates that the acts complained of by Cross are "arguably within the scope of their employment;" but, the court does not explain how acts of battery and threats to personal health and life of Cross are "within the scope" of an automobile manufacture's business enterprise.[8]

By ruling as it did the decision of the eighth circuit court of appeals conflicts with another federal court of appeals, namely, Novotny v. Great American Federal Saving and Loan Association, 584 F 2d 1235, (3rd Cir. 1978), reversed on other grounds, 422 U.S. 366, 99 S. Ct. 2345 60 L Ed. 2d 957 (1979). Although this

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8. Many of the acts alleged violative of the statutes here in question do not suggests that they where conducted pursuant to legitimate business goals. To the contrary, during the discovery deposition of plaintiff below

Court reversed the decision in Novotny, supra, this Court specifically noted that ". . . , we assume but certainly do not decide that the directors of a single corporation can form a conspiracy within the meaning of § 1985(3)." Novotny, supra, at 372 n. 11. Many lower courts have decided the question of conspiracy under 42 U.S.C § 1985(3) without any consideration of the import of the above footnote in Novotny.

In ruling as it did in the case at bar, the appeals court has decided an important question of federal law which has not been, but should be, settled by this Court. This need for settlement is accentuated by the myriad conflict in decisions by lower courts. See, e.g., Herrman v. Moore, 576 F. 2d 453 (2d Cir.

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many acts supportive of the allegation under 1985(3) involved medical records of plaintiff having been changed by a doctor after collusion with nonmedical agents.

1978); Girard v. 94th St. & Fifth Ave., Corp. 530 F. 2d 66 (2d Cir. 1976), cert. denied, 425 U.S. 974, 96 S. Ct. 2173, 48 L. Ed. 2d 798 (1976); Dombrowski v. Dowling, 450 F. 2d 190 (7th Cir. 1972); Contra, Novotny, supra; Dupree v. Hertz Corp., 419 F. Supp. 764 (E.D. Pa. 1976); Beamon v. W.B. Sander Co., 413 F. Supp. 1167; Jackson v. University of Pittsburg, 405 F. Supp. 607 (W.D. Pa. 1975); the aforementioned represents a nonexhaustive cross section of divergent legal opinion.

The authority cited above holding that a single corporate entity cannot form a conspiracy as contemplated by § 1985(3) fail to deal with several important considerations, namely, (a) the significance of agents who act outside the scope of their employment, (b) the significance of agents that advance a nonbusiness related purpose of the corporate entity (especially

where the act or acts are performed by, or at the direction of, agents high within the corporate structure and where the acts are invidious and injurious to another), (c) agents that are motivated in part by personal reasons, (d) agents, like nonagents, who acts in concert are a greater threat to society than are individuals who act alone, their numbers allow exploitation of unlawful talents, (e) there appears to exists no reason sound in logic as to why incorporation alone — in our modern age — need provide immunity for unlawful acts, (f) Congress has attached high priorty on the protection of the civil rights laws and their enforcement, and lastly, § 1985(3) does not mandate that more than a single tortfeasor-conspirator be sued or that more than a single person be named in any suit instituted in vindication of its remedial

purview, quite to the contrary, the statute states,

> ". . .in any case of conspirary set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injuried in his person or property, or deprived of having and exercising any right or privilege of citizenship of the United States, the party so injured or deprived may have an action for recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators." (Empahsis supplied)[9]

Moreover, this Court in Griffin v. Breckenridge, 403 U.S. 88, at 102-03, 91 S. Ct. 1790, 29 L. Ed. 2d 338 (1971), held that a single act is sufficient to establish liability under the statute. This holding is consistent with the above suggestion concerning the lack of necessity to name more than a single corporation or person, and therefore, the controlling consideration would appear to be whether the body of the allegations charging a violation of the statute states a claim.

Under the circumstances of the case at bar, Cross's complaint satisfied many of the requirements deemed necessary by lower courts in order to state a cause of action. First, the agents of the corporate entity were named in both their corporate and individual capacities as defendants.[10] Second, the allegations revealed that more than a single act was involved, the violations covered eight years of invidious disparate treatment and were found by the trial court to probably involve a continuing violation. Third, the allegations revealed the involve- of many corporate agents who themselves were both high and low on the corporate ladder.[11]

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9. 42 U.S.C. § 1985(3)

10. The appeals court did not accurately relate the state of the complaint when it concluded that only GMC was named as a defendant. In fact, the lower court dismissed other named defendants for lack of in personam jurisdiction.

11. The agents directly involved were foremen, general foremen, supervisors, medical and insurance personnel, labor relations, etc.

Given the varied and contradictory case law existing among the lower courts and the reservation noted in Novotny, regarding the purview of 42 U.S.C. § 1985(3) it is appropriate that this Court consider this matter of special importance to civil rights litigants and of general significance to the public at large.

Revocation Of In Forma Pauperis Status

Cross accurately reported his income on the financial affidavit submitted to obtain the status of in forma pauperis. The district court has not shown how it was inaccurate, the reason is simple, the amount reported was the total amount earned by Cross from his sole source of income, viz., his law practice. However, because Cross was, at the time of the application, married to his former spouse, the financial affidavit required him to disclose what his former spouse earned. Cross made a judgement regarding the amount of his former spouse's earnings per month as required by financial affidavit, such judgement was based on information then in possession of Cross. Cross had in his possession the W2 form of his former spouse for the year next preceding the year in which the financial affidavit was filed (i.e., 1980). Cross

was not, at the time of the financial affidavit, living with his former spouse. In fact, Cross was sparated from his former spouse at the time the application for the status was filed with the district court. Nevertheless, Cross was required to report his then spouse's earning per month.[12] The report of his spouse's earning per month was accomplished by taking the total amount earned for the year 1979 and subtacting therefrom the amount of taxes deducted and dividing the remainder by 12 (the number of months in a year). This method of arriving at an answer produced a figure of $688.33, to which Cross rounded off to $700.00. The figure of $700.00 was supplied as the answer to the question of the amount earned by Cross's former spouse per month.

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12. The affidavit did not specify net earnings/ gross earnings. However, with respect to the affiant the requirement was "income" last 12 mos.

Base on the foregoing information the district court granted leave to Cross to proceed in forma pauperis. However, following dismissal of the cause of action and on January 7th, 1982, the court directed Cross to file income tax records to be obtained from the IRS with the court. Following these instruction and on June 30, 1982, the court set a hearing for July 16, 1982, at which hearing, the court after being advised of Cross's then existing family circumstance, his circumstances at the time of application (as above described), his method of arriving at the stated spouse's earnings per month, the absence of the spouse as a named plaintiff, the absence of the sponse from residency in St. Louis (the situs of the litigation), and Cross's lack of knowledge respecting any wage increases or overtime pay on behalf of the former spouse of Cross, the court neverthe-

less withdrew the status citing as a foundation for the action disparity in amounts on the financial affidavit filed October, 1980 and Cross's joint 1040 income tax form filed in 1981. The court did not indicate why Cross's explanation for the disparity was not satifactory.

At least two problems exists with the position of the court below. First, the income reported in October, 1980, on the financial form relates to monies received before the application is filed, while the court's consideration involves monies received after the said form was filed. Second, none of the former spouse's earnings were available to Cross, and yet the court concludes that ". . .plaintiff . . .materially understates the income and resources available to plaintiff. . ."[13]

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13. See appendix p. A5-1

In affirming the district court on this issue, the court of appeals, in its opinion, does not specifically address the issue of revoking the status, but rather, the court states, "Under 28 U.S.C. § 1915, the decision to grant or deny in forma pauperis status is within the sound discretion of the trial court."(citations)[14] Hence, to grant or deny, if at all, only vaguely addresses the question of revokation and whether the court properly considered all necessary factors. In the instant case, Cross did not have sufficient funds to attached to subpoenas for milage and attendance fees and costs.[15]

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14. See appendix p. A1-10

15. Cross had served nearly twenty subpoenas. If the status of in forma pauperis was not available many witnesses would not have been served subpoenas that would have been effective to require their presence in court, Cross's income at that time did not allow sufficient monies to provide same. Moreover, Cross's income was unstable, he was self-employed and had only recently become a practicing attorney.

An additional observation that advances the reasons for issuance of the writ in the matter sub judice is the position held by Cross, he is an attorney at law. By affirming the district court, the court of appeals allows to stand the reasons advanced by the district court, which reasons, in part, casts aspersions on the professionalism and credibility of Cross as an attorney at law.

The foregoing obtains in the following manner; the appeals court affirms the dismissal, the district court reasons are that (a) ". . .plaintiff. . .repeatedly delayed the proceedings by failing to comply promptly with the Court's rules of procedure." (However, the court does not identify what rules of procedure Cross failed in compliance)[16] (b) ". . .plaintiff's failure to produce complete tax returns is

16. See apendix p. A2-4

sufficient indicia of bad faith. . .to merit judicial remonstrance. . .and shows a callous disregard for. . .responsibilities as an attorney and officer of the court."[17] (However, the record will reflect that Cross provided all tax returns in his possession pursuant to the court's direction, and in addition, the record will reflect that not only did Cross provide copies of his tax returns, but that he also provided same well in-advance of the time imposed by the court and he brought to court the original tax returns and related documents (W2s etc.) the following day so as to allow the court to inspect the originals) (c)". . .The Court directed plaintiff to produce his tax returns and plaintiff, in callous disregard of his professional responsibilities, failed to do so."[18] (However, the record

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17. & 18. See appendix p. A2-5

will reflect that Cross produced the tax returns. In the appeals court opinion[19] it is stated that Cross "substantially complied." To repeat, the record will reflect that the directions of the district were followed in all respects by Cross.) (d)". . .A layman may freely claim ignorance of the law as an excuse. . . ,but a laywer may not resort to such a defense."[20] (However, the record will reflect that no law is cited by the district court about which Cross has claimed "ignorance" of and the record is void of any defense asserted by Cross based on "ignorance." Lastly, for brevity sake, (e) "The Court also finds that the serious sanction of dismissal must be available to the district court, ... , to serve as a deterrent to others who might employ dilatory tactics. . ."[21] (However,

19. See appendix p. A1-7

20. & 21. See appendix p. A2-5

the record will reflect that Cross's history throughout the proceedings below are completely clear of any activity that could be interpreted as "dilatory tactics" and, indeed, neither the court of appeals nor the district court illustrates what the "cumulative effect of plaintiff's conduct" was nor how such conduct delayed the proceeding below, to the contrary, Cross did nothing to delay trial below and on every occasion the court inquired whether the parties were ready for trial, Cross answered "ready", only GMC obtained delays.)

It is clear from the above that the district court has provided reasons that are not, and cannot be, supported by the record. It suggests that revocation of the status of in forma pauperis may have occurred without first fully considering the facts of the case.

Assessment Of Costs Against Cross

It is your petitioner's position that because his action below could not be held to provide a basis for dismissal that assessing costs against him is an abuse of discretion. Much of the costs, at both the appellate and trial levels, have not been correctly calculated and sought in-accord with rules of procedure. Par example:

GMC was awarded cost for the production of its brief, however, Federal Rule Of Appellate Procedure 39(d) states,

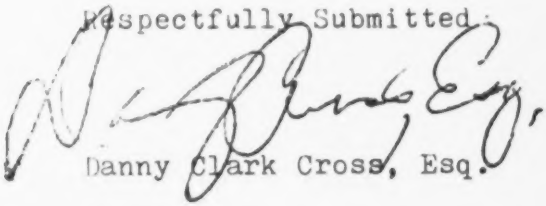
> A party who desires such cost to be taxed shall state them in an itemized and verified bill of costs which shall be filed with the clerk, with proof of service, within 14 days after entry of judgement. Objections to the bill of costs must be filed within 10 days of service on the party against whom costs are to be taxed. . ."

In the case sub judice there has been no service of any itemzed and verified bill of costs, and yet, costs have been awarded

in an amount, when combined with those at the trial level, exceeds $1,376.00.

In recognition of Supreme Court Rule 21.4, your petitioner believes that nothing else need be presently written concerning the assessment of costs. Further amplification can be performed should this Honorable Court grant the requested Writ Of Certiorari.

Respectfully Submitted,



Danny Clark Cross, Esq.

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Please Note:

Footnote references within the petition:

(1) Reference to appendix p. A1-7 refers to page 13 of the Appellate Court's Opinion, which is the first document of the appendix. (Such references are found in the petition at notes 2, 6, 7, and 19).

(2) Reference to appendix p. A1-10 refers to page 18 of the Appellate Court's Opinion. (Such reference can be found in the petition at note 14).

(3) Reference to appendix p. A2 thru A2-6 refers to the District Court's Order

of January 7th, 1982. (Such reference can be found in the petition at notes 4 and 16)

(4) Reference to appendix p. A2-5 refers to the District Court Order of January 7th, 1982. (Such reference can be found in the petition at notes 17, 18, 20 and 21.)

(5) Reference to appendix p. A3 thru A3-4 refers to the District Court Order of December 7th, 1982. (Such reference can be found in the petition at note 5.)

(6) Reference to appendix p. A5-1 refers to the District Court Order of April 26th, 1983. (Such reference can be found in the petition at note 13.)

*Special Notation: All page numbers of the appendix are stamped on reverse side of the opinion or order contained therein.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-1710

Danny Clark Cross,

Appellant,

v.

General Motor Corp.,

Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: November 7, 1983
Filed: November 18, 1983

Before HEANEY, BRIGHT and ROSS, Circuit Judges.

HEANEY, Circuit Judge.

Danny Clark Cross, an attorney, appeals pro se from the district court's[1] dismissal without prejudice of his employment discrimination action. The court dismissed Cross's claim pursuant to Fed. R. Civ. P. 37(b) for willful failure to comply with a discovery order. Subsequently,

[1] The Honorable William L. Hungate, United States District Judge for the Eastern District of Missouri.

the district court also revoked Cross's in forma pauperis status, and assessed certain costs against him. On appeal, Cross contends that the district court (1) abused its discretion in dismissing his cause of action, (2) improperly dismissed one count of his complaint alleging conspiracy under 42 U.S.C. § 1985(3) (3) improperly revoked his in forma pauperis status, and (4) erred in assessing certain costs against him. We Affirm.

BACKGROUND

On April 4, 1980, Cross filed a civil rights action against his former employer General Motors Corporation (GMC), asserting claims of employment discrimination under 42 U.S.C. §§ 1981 and 1985(3). Cross alleged that GMC and its agents had conspired to harass him and deprive him of employment rights because of his race. He further alleged racially motivated disparate treatment by GMC. Cross filed a

motion to proceed in forma pauperis, which the district court granted based on a financial affidavit filed by Cross in October of 1980.

The course of event after Cross filed his complaint was far from smooth. After several amendments and proposed amendments to pleadings, numerous motions,[2] four pretrial conferences between the court and the parties on discovery and pleading matters, and ten trial dates, the case finally came to trial on January 5, 1982.[3] Following jury selection, GMC informed the court that in December, 1981, Cross had been served with a subpoena duces tecum requiring him to produce at trial all his income tax returns for the years 1968 to 1981. Cross did not produce the tax returns on January

[2]GMC filed a pretrial motion requesting, inter alia, that Cross's § 1985(3) claim be dismissed. On December 18, 1980, the district court dismissed Cross's conspiracy count for failure to state a claim.

[3]After leaving General Motors Corporation in 1976, Cross obtained a law degree. He represented himself at trial, appearing for the first time in federal court.

5. He stated that he did not believe the subpoena was valid because it requested that the documents be produced on December 7, 1981, the date of a prior trial setting of the case, yet the subpoena was not served until December 22, 1891. Judge Hungate stated that he did not want the trial delayed by technical objections, and the following agreementwas reached:

> THE COURT: Now, you know he wants your tax returns, Mr. Cross. Do you have them?
>
> MR. CROSS: Judge, I informed counsel I had tax returns from the years '78 through '80, that he could have copies of that. And I would execute a waiver and he could go to the Internal Revenue Service and get all the files he desires.
>
> THE COURT: Mr. Sunnen, can we start with that?
>
> MR. SUNNEN: That's fine.
>
> THE COURT: Can you furnish that to him?
>
> MR. SUNNEN: This afternoon would be fine, but I don't need them this instant, but if he could give them.
>
> THE COURT: Prior to tomorrow morning.
>
> MR. CROSS: I only have them for '78

through '80 and I'll execute the waiver.

THE COURT: Would that be adequate?

MR. SUNNEN: If he does not have the documents, he cannot produce them. That is adequate for our purposes.

Cross produced nothing until the morning of January 6, 1982, at which time he tendered photocopies of the first page of a Form 1040 for 1978, and of Forms 1040 for 1979 and 1980. No W-2 forms, schedules or other information was attached, I addition, Cross offered a photocopy of a signed Internal Revenue Service Form 4506, a request for Copy of Tax Form.

GMC contended that the forms submitted by Cross were unsatifactory and incomplete, and moved the court to find Cross in contempt. GMC also pointed out that the limited information on the papers offered by Cross indicated that Cross might not be entitled to proceed in form pauperis. Judge Hungate did not grant GMC's motion for contempt, but did express disbelief that Cross an attorney, could possibly think the three

sheets of paper submitted that morning represented an adequate, good faith response to GMC's request. Judge Hungate stated that under the circumstances, he should probably dismiss the case, but he wanted to give Cross every opprotunity to comply fully with the court's order. He then specifically directed Cross to produce full and complete copies of all available tax returns for 1978, 1979, and 1980, including all schedules and attachments, and to deliver them to GMC along with original, signed copies of Form 4506 authorizing the IRS to release copies of Cross's tax returns for the year 1976 through 1980. Judge Hungate warned Cross that sanctions would be imposed if Cross failed to furnish the documents to GMC before court convened at 9:00 the following morning. That afternoon, Cross delivered to GMC's attorney photocopies of his tax returns for the years in question, complete with schedules and W-2 forms. He also

tendered several copies of IRS Form 4506. The IRS release forms were blank except for Cross's signature, the date, and a mark indicating that Cross wanted copies of all pages and attachments to be released.

When the court reconvened on January 7, GMC moved to dismiss the action, to revoke Cross's in forma pauperis status, and to require Cross to secure costs. GMC contended that the forms Cross delivered to defense counsel on the afternon of January 6, did not seem to be the same as the documents submitted earlier that day in court. Cross explained that the forms were the same, except that he had filled in social security numbers on the copy of the 1979 form.[4] GMC also claimed that one photocopy of a W-2 form submitted by Cross

[4]On reviewing the record, it appears that the three sheets of paper submitted on the morning of January 6, the more complete forms submitted that afternoon, and the forms later obtained from IRS files were, in fact, copies of the same documents. The original forms filed with the IRS did, however, contain some identifying information (social security number, the taxpayer's name and address on a

was illegible, and that the Forms 4506 did not contain sufficient information to permit GMC to obtain Cross's tax returns from the IRS. Cross acknowledge that he had the information necessary to complete the IRS release forms, but pointed out that he had already furnished most of that information to GMC in the course of discovery. Thus, he felt defense counsel could complete the forms to request whatever tax returns GMC wanted. Cross indicated that he had intended to comply with the court's order, and believed that he had done so.

After considering the arguments of both parties, the district court concluded that Cross had displayed callous disregard for his responsibilities as an attorney, and that his actions showed sufficient

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printed sticker furnished by the IRS) not present on the copies retained by Cross.

indicia of bad faith to warrant imposition of serious sanctions.[5] The court therefore dismissed Cross's cause of action without prejudice, but retained jurisdiction to determine appropriate allocation of costs and to consider whether Cross's in forma pauperis status should be revoked. Judge Hungate noted that the tax returns produced by Cross raised serious questions about the truthfulness of the sworn financial statement submitted in support of Cross's in forma pauperis request. Cross was therefore ordered to obtain copies of his income tax returns for 1978, 1979, and 1980 from the IRS, and to submit them to the district court before June 30, 1982.

Cross duly submitted the requested forms to the district and, on July 16, 1982, a show cause hearing was held to determine whether Cross's in forma pauperis

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[5]Judge Hungate noted that in reaching his decision, he had considered the cumulative effect of Cross's behavior, which included appearing once in

status should be withdrawn. On December 7, 1982, the district court entered an order partially granting GMC's motion for fees and costs, and assessing costs against Cross in the amount of $290.82. On April 26, 1983, the district court entered a final order revoking Cross's in forma pauperis status. This appeal followed.

ISSUES:

A. Abuse of Discretion in Dismissing the Cause of Action

Cross first alleges that the district court erred in dismissing his cause of action in the circumstances of the present case. Fed. R. Civ. P. 37(b) gives the trial court discretion to impose a variety of sanctions, including dismissal, for failure to obey discovery orders.[6] Im-

in court in shirt sleeves and arriving late in court on both Janaury 6 and January 7.

[6]Rule 37(b) provided that the court may treat the failure to comply with a discovery order as contempt of court, require payment of reasonable attorney's fees, stay proceedings until the discovery order has been obeyed, require admissions, allow designated evidence, strike pleadings, or enter a dismissal or default judgement.

position of such sanctions should not be reversed unless there has been an abuse of discretion. See, e.g., National Hockey League v. Metropolitan Hockey Club, 427, U.S. 639, 642 (1976); English v. 21st Phoenix Corp., 590 F.2d 723, 728 (8th Cir.), cert denied, 444 U.S. 832 (1979); Fox v. Studebaker-Worthington, Inc. 516 F.2d 989, 993 (8th Cir. 1975). The more severe sanctions of dismissal and default are, however, appropriately imposed only where failure to comply with a discovery order is due to willfulness, fault, or bad faith. Societe Internationale v. Rogers, 357 U.S. 197, 212 (1958); Laclede Gas Co. v. G. W. Warnecke Corp., 604 F.2d 561, 565-566 (8th Cir. 1979); Kropp v. Ziebarth, 557 F.2d 142, 146 (8th Cir. 1977)

In the case at hand, it appears that the district court acted within its discretion for several reasons. First, the record indicates that Cross's failure to comply promply and fully with the discovery

request was not because of inability to do so. He had both the tax returns and the information necessary to complete the release forms in his possession. The district court clearly believed Cross was acting in bad faith. See Laclede Gas Co. v. G. W. Warnecke Corp., supra, 604 F.2d at 566. Second, the district court's Memorandum of January 7, 1982, suggests that Judge Hungate properly considered the full record and looked at the cumulative effect of Cross's conduct in deciding that his behavior warranted dismissal of the action. See Link v. Wabash Railroad Co., 370 U.S. 626, 634-635 (1962). Finally, the severity of the sanction is mitigated by the fact that the dismissal was without prejudice. Cross can refile his complaint and have his day in court. See Laclede Gas Co. v. G. W. Warnecke Corp., supra, 604 F.2d at 566. Thus, we cannot say the district court abused its discretion in this instance.

We note, however, that one reason for

a trial court to employ sanctions is "to prevent undue delays in the disposition of pending cases * * *." Link v. Wash Railroad Co., supra, 370 U.S. at 629. The instant case had already consumed a considerable amount of the court's time in pretrial matters, and, after many delays, had finally come to trial on January 5, 1982. The jury was selected, opening statements had been made, and witnesses were present. It is questionable whether the goal of judicial economy was served by dismissing the action without prejudice on the third day of trial, especially since it appears that Cross had substantially complied with the discovery request. Therefore, while we find no clear abuse of discretion, we emphasize that courts should be extremely reluctant to select the sanction of dismissal in such circumstances.

B. Dismissal of Cross's Conspiracy Claim Under 42 U.S.C. § 1985(3)

Cross next challenges the district court's dismissal on December 18, 1980, of his 42 U.S.C. § 1985(3) claim alleging a conspiracy by GMC and its agents to discriminate against him because of his race. Th is court has held that a corporation and its agents are a single person in the eyes of the law, and a corporation cannot conspire with itself. See Baker v. Stuart Broadcasting Co., 505 F.2d 181, 183 (8th Cir. 1974), quoting Dombrowski v. Dowling, 459 F.2d 190, 196 (7th Cir. 1972). As the seventh Circuit observed in Dombrowski,

> if the challenged conduct is essentially a single act of discrimination by a single business entity, the fact that two or more agents participated in the decision or in the act itself will normally not constitute the conspiracy contemplated by § 1985(3) .

459 F.2d at 196 (citations omitted). Accord Girard v. 94th Street & Fifth Avenue Corp., 530 F.2d 66, 70 (2d Cir.), cert. denied,

425 U.S. 974 (1976).

Cross argues that his complaint alleges not "a single act of discrimination," but continuing violations, and thus should not fall within the Dombrowski line of cases. See Racklin v. University of Pennsylvania, 386 F. Supp. 992, 1005-1006 (E.D. Pa. 1974) (claims of continued and varied instances of discrimination and harassment involving more than a single decision by one business entity supported a conspiracy allegation). Cross correctly points out that the case law does not completelt foreclose the possibility of applying § 1985(3) to a single corporation. See, e.g., Great American Savings and Loan Ass'n v. Novotny, 422 U.S. 366, 372 n. 11 (1979); Stathos v. Bowden, F. Supp. 1288, 1291-1293 (D. Mass, 1981); Dupree v. Hertz Corp., 419 F. Supp. 764, 766 (E.D. Pa. 1976). However, courts that have held that an actionable section 1985(3) claim is presented have generally

done so only where individual defendants are named as well as the corporation, and those individuals acted outside the scope of their employment or for perosnal reasons. See. e.g., Coley v. M & M Mars, Inc. 461 F. Supp. 1073, 1076-1077 (M.D. Ga. 1978); Rackin v. University of Pennsylvania, supra, 386 F. Supp. at 1005-1006. Under he facts of the present case, where only GMC is named as a defendant, and the agents' alleged acts arguably were in the scope of the employment,[7] the district court did not err in finding that Cross had failed to state a claim upon which relief could be granted.

C. Revocation of Cross's In Forma Pauperis Status

The district court revoked Cross's in forma pauperis status after comparing

[7] Cross alleged, inter alia, that he was given inappropriate job assignments, that false entries were made in his employment records, and that certain requests (to see the plant doctor, to receive overtime pay) were improperly denied. He also claims that he was "watched" and "physically battered" by several foremen.

his income tax returns for 1980 with the financial affidavit he submitted on October 20, 1980. On the affidavit, Cross stated that his income for the preceding twelve months had been $1,684. His tax return for 1980 indicated that he had earned $3,175. Cross contends that he earned the $1,491 difference between October 20, when the affidavit was filed and the end of the calendar year. Cross reported his wife's income on the affidavit as $700 per month ($8,400 per year). The joint tax return showed that she earned over $13,000 in 1980. Cross explained that he reported his wife's net earnings per month after deducting the amount withheld for taxes because that was the amount of income actually available to him. The rest of the discrepancy Cross attributes to his wife's overtime earnings. He claims that he was unaware of these additional earning at the time he filed the affidavit because he and his wife were

living apart.

The district court found Cross's explanation for the disparity in income between the two documents unsatisfactory. The court concluded that Cross had materially understated the income and resources available to him in 1980, and withdrew his in forma pauperis status nunc pro tunc.

Under 28 U.S.C § 1915, the decision whethet to grant or deny in forma pauperis is within the sound discretion of the trial court. See, e.g., In Re Smith, 600 F.2d 714, 716 (8th Cir. 1979); Forester v. California Adult Authority, 510 F.2d 58, 60 (8th Cir. 1975). In the present case, the district court's conclusion that Cross had made false statements on his financial affidavit was not clearly erroneous, and the court did not abuse its discretion in revoking Cross's in forma pauperis status.

D. Assessment of Costs Against Cross

Cross's final contention is that the district court erred in awarding certain costs in favor of GMC. In its order dated December 7, 1982, the district court assessed a total of $290.82 in costs against Cross pursuant to Fed. R. Civ. P. 54(d).[8] Under Rule 54(d), allocation of costs is within the sound discretion of the trial court. See Missouri Pacific Railroad Co. v. Star City Gravel Co., 592 F.2d 455, 459-460 (8th Cir. 1979); Boyd v. Ozark Airlines, Inc., 568 F.2d 50, 55 (8th Cir. 1977). The district court's order indicates that the trial judge considered Cross's limited financial resources, but concluded that a partial award of costs in favor of GMC was nevertheless appropriate.

[8]The district court granted GMC's motion for $167.82 for costs to subpoena witnesses, and $123.00 for the costs of a special process server. The court denied GMC's request for $28,938 in attorney's fees, and $1,838 for copies of Cross's deposition.

In so doing, the district court did not abuse its discretion.

Accordingly, we affirm the judgement of the district court.

A ture copy.

Attested:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

DANNY CLARK CROSS, Plaintiff, v. GENERAL MOTORS CORP., Defendant.	No. 80-0450C(4)

ORDER

A memorandum dated this day is hereby incorporated into and made a part of this order.

IT IS HEREBY ORDERED that this cause be and the same is dismissed without prejudice, with jurisdiction retained to determine appropriate allocation of costs and other expenses, and imposition of sanctions, if any.

IT IS HEREBY FURTHER ORDERED that plaintiff Danny Clark Cross file with the Court completed copies of Internal Revenue Service Form 4506 requesting copies of plaintiff's tax returns for the year 1978, 1979, and 1980.

IT IS HEREBY FURTHER ORDERED that plaintiff file with the Court copies of plaintiff's 1978, 1979, and 1980 tax returns received from the Internal Revenue Service. If these copies are not filed on or before June 30, 1982, the Court, absent good cause shown, will apply appropriate sanctions.

IT IS HEREBY FURTHER ORDERED that upon receipt of copies of plaintiff's 1978, 1979 and 1980 tax returns, this Court will set a show cause hearing on whether plaintiff's in forma pauperis status should be withdrawn and other appropriate action.

Dated this 7th day of January, 1982.

William L. Hungate

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

DANNY CLARK CROSS, Plaintiff,	)	
v.	)	No. 80-045C(4)
GENERAL MOTORS CORP., Defendant.	)	

MEMORANDUM

This matter is before the Court on defendant's motions to dismiss, to revoke plaintiff's in forma pauperis status, and to require plaintiff to secure costs.

This matter involves allegations by plaintiff of employment discrimination by defendant. Plaintiff moved to be allowed to proceed in form pauperis on October 29, 1980. Based upon the financial affidavit filed by plaintiff, this Court granted plaintiff's motion. The financial affidavit stated that plaintiff's income for his law practice in the twelve months preceding October, 1980, was $1,684.00, and his wife's income was $700.00 per

month.

In December of 1981, defendant served upon plaintiff a subpoena duces tecum requiring plaintiff to produce at the start of trial copies of all his income tax returns for the years 1968 to 1981. When the case was called for trial on January 5, 1982, plaintiff did not produce the tax returns. Plaintiff stated that he did not believe the subpoena was valid because it requested that the documents be produce on December 7, 1981, the date of a prior trial setting of this case, but was not served until December 22, 1981.

Defendant's counsel demanded that plaintiff produce the requested returns on January 5, 1982, in open court. After dis- on the record, the parties agreed that plaintiff would produce tax returns for 1978, 1979, and 1980, as well as waivers from plaintiff allowing release of returns from the Internal Revenue Service files, by the end of the afternoon of January 5,

1982. Plaintiff produced nothing until the morning of January 6. Plaintiff then tendered to defendant copies of the first page of a 1040 form for 1978 and 1040A forms for 1979 and 1980, (filed with the Court and marked Court's Exhibits 1, 2, and 3.) No W-2 forms or schedules or any other information was attached.

On the morning of January 6, defendant moved the Court to find plaintiff in contempt for failure to produce the tax returns as requested. After careful examination of the three pages produced by plaintiff on the morning of January 6, and consideration of the statements of the parties on the record, the Court finds it absolutely incredible that plaintiff, an attorney representing himself, could believe that production of these three pages is a satisfactory response in good faith to defendant's request. Plaintiff in effect admitted to the Court that the 1979 1040 form tendered was not a copy of what

plaintiff submitted to the Internal Revenue Service. Plaintiff admitted that he tendered to defendant a copy of a 1040A form upon which plaintiff had transposed some information from the 1040 form actually sent to the Internal Revenue Service and which copy was kept merely for plaintiff's own records. The copy does not contain any name, address, or social security number of the taxpayer. Furthermore, the 1040 form for 1978 only contains a dollar amount repeated on four lines. It contains no information regarding deductions or taxes assessed. The Court finds it difficult to believe that these are copies of returns actually submitted to the Internal Revenue Service by plaintiff.

After argument on defendant's motion for contempt, the Court ordered plaintiff to produce full and complete copies of all available tax returns for the year 1978, 1979, and 1980, with all schedules and attachments; and execute and deliever to

defendant original, signed and executed forms that would allow release of plaintiff's tax returns on file with the Internal Revenue Service for the years 1976 through 1980. That afternoon, plaintiff delivered to the office of defendant's attorney certain photocopied documents and several Internal Revenue Service Forms 4506. Form 4506 is a Request for Copy of Tax Form. The tendered forms were blank, except for the date, a check mark in item 14, and plaintiff's signature. The other documents delivered were more complete tax return forms with schedules and W-2 forms for the year 1978, 1979, and 1980.

The Court finds that these more complete forms raise serious questions about plaintiff's sworn financial affidavit in support of his in forma pauperis request. For example, plantiff lists on his financial affidavit, filed October 20, 1980, as income for his law practice for the previous twelve months, $1,684.00. Schedule

C from plaintiff's 1980 return, however, lists his 1980 income as $3,175.00. The financial affidavit also lists his spouse's income as $700.00 per month ($8,400.00 per year) while the return indicates that she made over $13,000.00 in 1980.

In considering its decision, the appropriate use of judicial resources must be factored in. The cumulative effect of plaintiff's conduct herein must be weighed. It has been necessary to refer discovery disputes to a Magistrate on more than one occasion, and the cause has been reset many times. After a jury was impaneled, plaintiff pro se, in forma pauperis, nonetheless repeatedly delayed the proceedings by failing to comply promptly with the Court's rules of procedure. *

Rule 37(b) of the Federal Rules of Civil Procedure sets forth sanctions available to the district court for failure to comply with an order of court relating to discovery. Dismissal for failure to

produce documents or information is appropriate when the failure is due to willfulness, bad faith, or fault. National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976); Society Internationale Pour Participations Industrielles at Commerciales, S. A. v. Rogers, 357 U. S. 197, 212 (1958); Kropp v. Ziebarth, 557 F.2d 142 (8th Cir. 1977).

The Court concludes, after careful consideration of the record in this case, that plaintiff's failure to produce complete tax returns is suffient indicia of bad faith on the part of plaintiff to merit judicial remonstrance and shows a callous disregard for plaintiff's responsibilities as an attorney and officer of the Court. The record shows that plaintiff concedes that a pro se litigant who is an attorney should meet a higher standard of conduct and competence than a pro se litigant who is not an attorney. For, example, a layman

might assume that appearing in court late and in shirt sleeves were matters of no consequence, or that the front page of a 1040 tax form would suffice as compliance with a request for a year's tax return. A lawyer is required to know better and the Court suggested to the plaintiff that he may need a lawyer. The Court directed plaintiff to produce his tax returns and plaintiff, in callous disregard of his professional responsibilities, failed to do so. A layman may freely claim ignorance of the law as an excuse, and even then it may not recuse him, but a lawyer may not resort to such a defense.

The Court also finds that the serious sanction of dismissal must be available to the district court, not ony to deal with problems in the instant case, but also to serve as a deterrent to others who might employ dilatory tactics or show callous disregard for their responsibilities. National Hockey League v. Metropolitan

Hockey Club, Inc., supra, at 643. Again what the Court might excuse in a layman could be regarded as precedent if permitted to a lawyer. Therefore, the Court will dismiss plaintiff'f cause without prejudice.

Because of the question raised about plaintiff's in forma pauperis status, the Court concludes that further investigation is necessary. Therefore, the Court will require plaintiff to obtain copies of his 1978, 1979 and 1980 income tax returns as filed with the Internal Revenue Service and submit copies to the Court before June 30, 1982. The Court will upon receipt of the returns, set a hearing to determine whether plaintiff's in forma pauperis status was and is appropriate. If plaintiff fails to produce these returns by June 30, 1982, absent good cause shown, the Court will impose appropriate sanctions on plaintiff.

Dated this 7th day of January, 1982.

William L. Hungate
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

DANNY CLARK CROSS,

Plaintiff,

v.

GENERAL MOTORS CORP.,

Defendant.

No. 80-0450C(4)

ORDER

A memorandum dated this day is hereby incorporated into and made a part of this order.

IT IS HEREBY ORDERED that defendant's motion for attorney's fees and request for costs be and the same is granted in part and denied in part as follows. Defendant's request for costs in the subpoena of witnesses and for the cost of a special process server shall be allowed in the total sum of $290.82. All other costs requested shall be denied.

Dated this 7th day of December, 1982.

William L. Hungate
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

DANNY CLARK CROSS, Plaintiff,	)	
v.	)	No. 80-0450C(4)
GENERAL MOTORS CORP., Defendant.	)	

MEMORANDUM

This matter is before the Court on defendant's motion for allowance of attorney's fees and other costs.

Plaintiff, Danny Clark Cross, brought this employment discrimination action pursuant to 42 U.S.C. § 1981 against the defendant, General Motors Corporation, proceeding in forma pauperis. Plaintiff's action was dismissed without prejudice on July 16, 1982, following his repeated failure to produce suitably complete income tax returns necessary for the Court's determination of whether his in forma pauperis status should be revoked.

Defendant now seeks an order taxing

as costs to plaintiff its attorney's fees expended in defense of the entire litigation pursuant to The Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. § 1988. Section 1988 permits the court, in its discretion, to allow the prevailing party reasonable attorney's fees as costs.

The consideration underlying an award of attorney's fees to a prevailing plaintiff in a civil rights action are entirely different than those considered in deciding whether a defendant is entitled to reimbusement of legal fees upon dismissal. Mid-Hudson Legal Service, Inc. v. G & U, Inc., 578 F.2d 34, 37 (2nd Cir. 1978). A defendant may be entitled to such fees where the action defended against was "unreasonable, frivolous, meritless, or vexatious." Chirstianburg Garment Co. v. EEOC, 434 U.S. 412 (1978).

The Court is not persuaded that an award of fees in the amount requested is

apprppriate under the circumstances. Defendant seeks the lump sum of $28,938.00 for 534.2 hours of work. No supporting affidavit or itemized schedule of work performed has been offered.

It is unusual that plaintiff, an attorney, proceeded with this action in forma pauperis. While it is true that the Court determined that he could not continue to proceed on such basis and dismissed this action without prejudice, the power to tax costs should not be execised in manner that bars the courthouse door to indigent plaintiffs. See Action Alliance for Senior Citizens of Greater Philadelphia, Inc., v. Shapp, 74 F.R.D. 617, 620 (E.D. Pa. 1977). The attorney's fee requested will be denied.

Defendant also seeks $1,838.60 for the costs of "two copies of deposition." While the request is for "copies" and no formal bill of costs has been filed itemizing these expenses, it would appear that

this figure relates to the cost of defendant's four-volume deposition of plaintiff, rather than copies of the same. The Court has borad discretion to tax costs of depositions reasonably related to the case and not purely investigative in nature. Kroppinger v. Cullen-Schiltz & Associates., 513 F.2d 901, 911 (8th Cir. 1975). Under the present circumstances and for the reasons referred to above, these costs will be denied.

Finally, defendant requests $167.82 for the subpoena of witnesses and $123.00 for a special process server. The costs in the sum of $290.82 will be allowed to defendant pursuant to Fed. R. Civ. P. 54(d).

Dated this 7th day of December, 1982.

William L. Hungate
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

DANNY CLARK CROSS, Plaintiff, v. GENERAL MOTORS CORP., et al., Defendants.	No. 80-0450C(4)

ORDER

A memorandum dated this day is hereby incorporated into and made a part of this order.

IT IS HEREBY ORDERED that this cause be and the same is dismissed without prejudice as to defendants Lemon, Weedmon, Woodham, Williams, Smith, Tisoto and Knight.

IT IS HEREBY FURTHER ORDERED that defendant General Motors Corporation's motion to dismiss be and the same is granted as to Count I and denied as to Count II of plaintiff's complaint.

IT IS HEREBY FURTHER ORDERED that defendant's motion dismiss plaintiff's

claims arising from conduct occurring prior to April 4, 1975, be and the same is denied.

IT IS HEREBY FURTHER ORDERED that defendant's motion for a more definite statement be and the same is denied.

IT IS HEREBY FURTHER ORDERED that defendant's motion to strike plaintiff's prayer for punitive damages be and the same is denied.

IT IS HEREBY FURTHER ORDERED that defendant's motion to strike plaintiff's jury demand be and the same is granted.

Dated this 18th day of December, 1980.

William L. Hungate
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

DANNY CLARK CROSS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 80-0450C(4)
	)	
GENERAL MOTORS CORP., et al.,	)	
	)	
Defendants.	)	

MEMORANDUM

This matter is before the Court on defendant General Motors Corporation's pretrial motions, following plaintiff's written compliance with this Court's Order dated November 20, 1980, directing plaintiff to show cause why this action should not be dismissed as to those named defendants who have not been served. For the reasons stated below, this action shall be dismissed as to those named defendants who have not been served with plaintiff's complaint. Defendant General Motors Corporation's motion to dismiss will be granted as to Count I and denied as to Count II of plaintiff's amended complaint;

defendant's motion to dismiss plaintiff's claims which arise from conduct occurring prior to April 4, 1975, will be denied; defendant's motion for a more definite statement will be denied; defendant's motion to strike plaintiff's jury demand will be granted; and defendant's motion to strike plaintiff's prayer for punitive damages will be denied.

Plaintiff brings this civil rights action under 42 U.S.C. § 1985(3) and § 1981. In Count I, plaintiff alleges a conspiracy by General Motors Corporation and its agents to subject plaintiff to racial harassment and deprive plaintiff of employment rights. In Count II, plaintiff alleges racially motivated disparate application of defendant's work rules and regulations, culminating in plaintiff's constructive discharge.

On October 20, plaintiff filed a second amended complaint, adding seven individual defendants. As of Novemeber

20, 1980, plaintiff's complaint had not been served on any of the seven additional defendants. Therefore, the Court directed plaintiff to show cause why this matter should not be dismissed against the seven additional defendants for lack of personal jurisdiction.

Plaintiff candidly concedes his inability to obtain sufficient information to obtain effective service of process on the seven additional defendants at this stage of the proceedings. Absent service of process, however, the Court lacks in personam jurisdiction to adjudicate claims against these defendants. Zenith Radio Corp., v. Hazeltine Research, Inc., 395 U.S. 100, 110 (1969); Hansberry v. Lee, 311 U.S. 32, 40-41 (1940). Therefore, this cause will be dismissed without prejudice as to those defendants who have not been served.

Defendant moves the Court to dismiss plaintiff's complaint for failure to state

a claim upon which relief can be granted, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure.

Count I of plaintiff's complaint alleges a conspiracy by defendant General Motors Corporation and its agents. Because a corporation can only act through its agents, a corporation cannot be liable for a conspiracy with its own employees. The effect of charging a conspiracy between a corporation and its agents is to charge a conspiracy by a single party. Pearson v. Youngstown Sheet & Tube Co., 332 F.2d 439 (7th Cir.), cert. denied, 379 U.S. 914 (1964); Baker v. Stuart Broadcasting Company, 505 F. 2d 181 (8th Cir. 1974). Therefore, defendant's motion to dismiss for failure to state a claim upon which relief can be granted will be granted as to Count I.

In Count II, plaintiff alleges purposeful racially disparate treatment in the enforcement of defendant's work rules

and regulations, culminating in plaintiff's constructive discharge. Assuming the allegations of plaintiff's complaint to be true for jurisdictional purposes, plaintiff has stated a claim upon which relief can be granted under 42 U.S.C § 1981. See Windsor v. Bethesda General Hospital, 523 F.2d 891 (8th Cir. 1975). Therefore, defendant's motion to dismiss Count II will be denied.

Defendant moves to dismiss plaintiff's claims arising from conduct of defendant's agents occurring prior to April 4, 1975, as barred by the statute of limitations. Although the applicable statute of limitations for actions brought under 42 U.S.C. § 1981 in Missouri is five years, the statute does not run where, as in the instant case, a continuing wrong is alledged. Allen v. Amalgamated Transit Union, Local 788, 554 F.2d 876, 880 (8th Cir.), cert. denied, 434 U.S. 891 (1977). Therefore, defendant's motion to dismiss

plaintiff's claims arising from conduct occurring prior to April 4, 1975, will be denied.

In the alternative, defendant moves for a more definite statement, pursuant to Rule 8 of the Federal Rules of Civil Procedure. The Court concludes that plaintiff has set forth sufficient facts to notify defendant of plaintiff's claims. Further amplification of plaintiff's claims may be obtained through discovery proceedings pursuant to Rule 26 through 36 of the Federal Rules of Civil Procedure. Therefore, defendant's motion for a more definite statement will be denied.

Next, defendant moves to strike plaintiff's jury demand, asserting that plaintiff only seeks equitable relief.

Plaintiff's prayer seeks declaratory and injunctive relief, including reinstatement with back pay and full benefits, and punitive damages. Because the relief for which plaintiff prays is eqitable in nature

plaintiff is not entitled to a jury trial. Lynch v. Pan American World Airways, Inc., 475 F.2d 764 (5th Cir. 1973); Flores v. Local 25, Int'l. Brotherhood of Electrical Workers, AFL-CIO, 407 F. Supp. 218, 221 (E.D. N.Y. 1976). Therefore, defendant's motion to strike plaintiff's jury demand will be granted.

Finally, defendant moves to strike plaintiff's prayer for punitive damages, asserting that such damages are not recoverable under 42 U.S.C. § 1981. Defendant conceded, however, that its position is contrary to the controlling authority in the Eighth Circuit. Allen v. Amalgamated Transit Union, Local 788, supra at 883. Therefore, defendant's motion to strike plaintiff's prayer for punitive damages will be denied.

Dated this 18th day of December, 1980.

William L. Hungate
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

DANNY CLARK CROSS, Plaintiff,	)	
v.	)	No. 80-0450C(4)
GENERAL MOTORS CORP., Defendant.	)	

ORDER

This matter came on for hearing for the purpose of determining whether plaintiff's in forma pauperis status should be withdrawn and for consideration of other appropriate action. Plaintiff appeared pro se. Defendant appeared by counsel. All brief having been filed and considered, and the argument of plaintiff and defendant having been heard, the Court finds as follows.

Based upon true copies of plaintiff's federal income tax returns for the years 1978, 1979 and 1980, submitted by the plaintiff, the Courts finds that the application and supporting affidavit of plain-

tiff, filed with the Court on October 20, 1980, materially understates the income and resources available to plaintiff as reflected in the income reported in plaintiff's joint return (IRS 1040) filed for the calendar year 1980. The Court concludes upon this showing and the failure of any explanation for the disparity of income reported in these documents, that plaintiff's application and financial affidavit, made under pentaly of perjury, were false, incorrect, and untrue. Accordingly,

IT IS HEREBY ORDERED that leave previously granted to file this action in forma pauperis based upon plaintiff's application and financial affidavit of October 20, 1980, be and the same is withdrawn and revoked nunc pro tunc. 28 U.S.C. § 1915.

IT IS HEREBY FURTHER ORDERED that plaintiff's motion for leave to file a proposed form of final order be and the same is denied.

IT IS HEREBY FURTHER ORDERED that the request of defendant, filed April 15, 1983, to have the proposed order filed by it entered, be and the same is denied as moot.

Dated this 26th day of April, 1983.

William L. Hungate
UNITED STATES DISTRICT JUDGE

JUDGEMENT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-1710-EM September Term, 1983

Danny Clark Cross,

Appellant,

vs.

General Motors Corp.,

Appellee.

Appeal from the United States District Court was submitted on the record of the said District Court and briefs of the parties without oral argument.

After consideration, it is ordered an and adjudged that the judgement of the sai said District Court in this cause be and the same is hereby affirmed in accordance with the opinion of this Court.

November 18, 1983

Total costs of appellee briefs
for recovery from appellant: $962.71

A true copy.
ATTEST: Robert D. St. Vrain
Clerk, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT 1/3/84

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-1710. September Term, 1983

Danny Clark Cross, Appellant, vs. General Motors Corp., Appellee.	Appeal from the United States District Court for the Eastern District of Missouri

It is now here ordered by the Court that appellant's petition for rehearing is dismissed as untimely.

December 23, 1983

END OF DOCKET